

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CRJS 13-01 Massage Establishments

**SPONSOR(S):** Criminal Justice Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	13 Y, 0 N	Cunningham	Cunningham

### SUMMARY ANALYSIS

Chapter 480, F.S., entitled the "Massage Practice Act" (Act), governs the practice of massage in Florida. A significant portion of the Act is dedicated to regulating massage establishments, which are defined as "a site or premises, or portion thereof, wherein a massage therapist practices massage." While the majority of massage establishments engage in the legitimate practice of massage, some have been recognized as sites where illegal activity, such as human trafficking, occurs.

The Act currently contains numerous provisions prohibiting operators of massage establishments from committing specified acts. Both administrative and criminal penalties may be imposed upon those who do. While these provisions help in preventing illegal activity in massage establishments, recent news reports indicate that a small number of massage establishments continue to engage in illegal activity.

The bill amends the Act to create additional prohibitions that are designed to curb illegal activity in massage establishments. Specifically, the bill creates s. 480.0475, F.S., which makes it a first degree misdemeanor for:

- A person to operate a massage establishment between the hours of 10:00 p.m. and 6:00 a.m.; or
- A person operating a massage establishment to use or permit such establishment to be used as a principle domicile unless the establishment is zoned for residential use under local ordinance.

A second or subsequent violation is a third degree felony.

The prohibition relating to operating hours does not apply to massage establishments:

- Located on the premises of a health care facility, hotel, motel, or a bed and breakfast inn; or
- In which every massage performed between the hours of 10:00 p.m. and 6:00 a.m. are performed by a massage therapist acting under the direction of a physician or physician assistant, an osteopathic physician or physician assistant, a chiropractic physician, a podiatric physician, an advanced registered nurse, or a dentist.

The bill also amends s. 823.05, F.S., to declare massage establishments that operate in violation of the above-described provisions (and s. 480.0535(2), F.S., which requires massage establishment operators to provide identification upon request of a law enforcement officer) a nuisance that may be abated or enjoined as provided in ss. 60.05 and 60.06, F.S.

Because the bill creates new offenses punishable as misdemeanors and felonies, it may have a negative jail bed impact on local governments as well as a negative prison bed impact on the Department of Corrections.

The bill is effective October 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Massage Establishments**

In October 2010, the Center for the Advancement of Human Rights at Florida State University provided the Florida Task Force on Human Trafficking a “Statewide Strategic Plan on Human Trafficking.”<sup>1</sup> The Strategic Plan found that Florida is the third most popular American destination for human traffickers and that sex trafficking is the most under-reported offense.<sup>2</sup> The Strategic Plan noted that massage establishments have been noted as sites where trafficking occurs.<sup>3</sup>

Chapter 480, F.S., entitled the “Massage Practice Act” (Act), governs the practice of massage<sup>4</sup> in Florida. A significant portion of the Act is dedicated to regulating massage establishments, which are defined as “a site or premises, or portion thereof, wherein a massage therapist practices massage.”<sup>5</sup>

Massage establishments may only operate if they have applied for and received a license from the Department of Health (DOH) in accordance with rules adopted by the Board of Massage Therapy (Board).<sup>6</sup> The Board’s rules:

- Govern the operation of massage establishments and their facilities, personnel, safety and sanitary requirements, financial responsibility, insurance coverage;
- Require DOH to inspect a proposed massage establishment upon receipt of an application for licensure to ensure that the site is to be utilized for massage; and
- Require DOH to periodically inspect licensed massage establishments at least once a year.<sup>7</sup>

#### *Administrative Penalties*

The Act sets forth a multitude of instances in which an operator of a massage establishment can be administratively disciplined by the Board. These include:

- Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of massage or to the ability to practice massage;
- False, deceptive, or misleading advertising;
- Aiding, assisting, procuring, or advising any unlicensed person to practice massage contrary to the provisions of the Act or to a rule of the Board;
- Making deceptive, untrue, or fraudulent representations in the practice of massage;
- Violating a lawful order of the Board previously entered in a disciplinary hearing;
- Refusing to permit the department to inspect the business premises of the licensee during regular business hours; and
- Failing to keep the equipment and premises of the massage establishment in a clean and sanitary condition.<sup>8</sup>

Operators of massage establishments may also be administratively disciplined for violating *any provision* of the Act or ch. 456, F.S.,<sup>9</sup> or any rules adopted pursuant thereto.<sup>10</sup>

Administrative disciplinary action includes:

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<sup>1</sup> The plan is available and can be viewed at [http://www.cahr.fsu.edu/sub\\_category/Florida\\_StrategicPlanonHumanTrafficking.html](http://www.cahr.fsu.edu/sub_category/Florida_StrategicPlanonHumanTrafficking.html) (last visited January 22, 2013).

<sup>2</sup> Page 3 of the Strategic Plan.

<sup>3</sup> Page 11 of the Strategic Plan.

<sup>4</sup> The term “massage” is defined as the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation. Section 480.033(3), F.S.

<sup>5</sup> Section 480.033(7), F.S.

<sup>6</sup> Section 480.043(1), F.S.

<sup>7</sup> See Rules 64B7-26.003, 64B7-26.004, and 64B7-26.005, F.A.C.

<sup>8</sup> Section 480.046(1), F.S.

<sup>9</sup> Chapter 456, F.S., regulates health professions and occupations.

<sup>10</sup> Section 480.046(1)(o), F.S.

- License denial;
- Refuse to certify, or certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Restrict one's practice or license;
- Impose an administrative fine not to exceed \$10,000 for each count or separate offense; and
- Place the licensee on probation and subject to such conditions as the Board may specify.<sup>11</sup>

The Board can also revoke or suspend the license of a massage establishment in the following instances:

- Upon proof that a license has been obtained by fraud or misrepresentation; or
- Upon proof that the holder of a license is guilty of fraud or deceit or of gross negligence, incompetency, or misconduct in the operation of the establishment so licensed.<sup>12</sup>

The Board has adopted a rule<sup>13</sup> outlining the administrative disciplinary guidelines to be used when it finds that an applicant or licensee has violated the Act.<sup>14</sup> These guidelines range from small fines for first-time minor violations to large fines and license revocation for more serious violations.<sup>15</sup>

### *Criminal Penalties*

The Act also imposes criminal penalties for certain violations. Section 480.047, F.S., makes it a first degree misdemeanor<sup>16</sup> for a person to:

- Hold himself or herself out as a massage therapist or to practice massage unless duly licensed under the Act or unless otherwise specifically exempted from licensure under the Act;
- Operate any massage establishment unless it has been duly licensed;
- Permit an employed person to practice massage unless duly licensed;
- Present as his or her own the license of another;
- Allow the use of his or her license by an unlicensed person;
- Give false or forged evidence to DOH in obtaining any license;
- Falsely impersonate any other license-holder of like or different name;
- Use or attempt to use a license that has been revoked; or
- Otherwise violate any of the provisions of the Act.

A new criminal penalty was created in 2012, when the Legislature passed House Bill 7049. The bill, which contained a variety of provisions designed to enhance Florida's human trafficking laws, attempted to curb illegal activity in massage establishments by creating s. 480.0535, F.S. The statute makes it a second degree misdemeanor<sup>17</sup> if a person operating a massage establishment cannot:

- Immediately present, upon the request of a DOH investigator or a law enforcement officer:
  - Valid government identification while in the establishment; and
  - A copy of specified documentation for each employee and any person performing massage in the establishment.
- Ensure that each employee and any person performing massage in the massage establishment is able to immediately present, upon the request of a DOH investigator or a law enforcement officer, valid government identification while in the establishment.<sup>18</sup>

Despite the Act's numerous administrative and criminal penalties, recent news reports indicate that some massage establishments continue to engage in illegal activity.<sup>19</sup>

<sup>11</sup> Sections 480.046(2) and 456.072(2), F.S.

<sup>12</sup> Section 480.046(3), F.S.

<sup>13</sup> Rule 64B7-30.002, F.A.C.

<sup>14</sup> The disciplinary guidelines also apply when the Board finds that an applicant or licensee as committed an act set forth in s. 480.0485, F.S. (relating to sexual misconduct); s. 480.047, F.S. (setting forth prohibited acts subject to criminal penalties); and s. 456.072, F.S. (containing general grounds for discipline for those in health professions). See Rule 64B7-30.002, F.A.C.

<sup>15</sup> Disciplinary proceedings must be conducted in accordance with ch. 120, F.S. Section 480.046(4), F.S.

<sup>16</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>17</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

<sup>18</sup> Section 480.0535(3), F.S. Subsequent violations of the statute are subject to increased penalties.

<sup>19</sup> See, e.g., "FBI raiding 'body-rub' joints in booming South Florida massage industry" [http://articles.sun-sentinel.com/2012-11-24/news/fl-fbi-massage-raids-20121124\\_1\\_massage-parlors-massage-businesses-massage-therapist](http://articles.sun-sentinel.com/2012-11-24/news/fl-fbi-massage-raids-20121124_1_massage-parlors-massage-businesses-massage-therapist) (last visited on January 22, 2013),

### Effect of the Bill

The bill creates s. 480.0475, F.S., entitled "Massage establishments; prohibited practices," and provides the following legislative intent language:

The Legislature recognizes that, although the majority of massage establishments are operated by law-abiding citizens, a small number of establishments are operated by persons who use the establishment as a place to engage in illegal activities, such as human trafficking and prostitution. It is the intent of the Legislature to protect the public and the state's massage profession and its reputation from persons operating massage establishments that engage in illegal activity. The Legislature also intends that the perpetrators of human trafficking be penalized for their illegal conduct and that the victims of trafficking be protected and assisted by the state.

The bill makes it a first degree misdemeanor for:

- A person to operate a massage establishment between the hours of 10:00 p.m. and 6:00 a.m.; or
- A person operating a massage establishment to use or permit such establishment to be used as a principle domicile unless the establishment is zoned for residential use under local ordinance.

A second or subsequent violation of the above-described provisions is a third degree felony.<sup>20</sup>

The prohibition relating to operating hours does not apply to massage establishments:

- Located on the premises of a health care facility as defined in s. 408.07, F.S.; or a hotel, motel, or a bed and breakfast inn, as those terms are defined in s. 509.242, F.S.; or
- In which every massage performed between the hours of 10:00 p.m. and 6:00 a.m. are performed by a massage therapist acting under the direction of a physician or physician assistant licensed under ch. 458, F.S.; an osteopathic physician or physician assistant licensed under ch. 459, F.S.; a chiropractic physician licensed under ch. 460, F.S.; a podiatric physician licensed under ch. 461, F.S.; an advanced registered nurse practitioner licensed under part I of ch. 464, F.S.; or a dentist licensed under ch. 466, F.S.

Because any violation of the Act is grounds for administrative disciplinary action, the two new prohibitions created by the bill now constitute grounds for such action by the Board.

### **Public Nuisances**

Section 823.05, F.S., deems certain places public nuisances. For example, subsection (1) of the statute currently specifies that a person is guilty of maintaining a nuisance if they erect, establish, continue, maintain, own or lease any:

- Building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01, F.S.;
- House or place of prostitution, assignation, or lewdness;
- Place or building where games of chance are engaged in violation of law; or
- Place where any law of the state is violated.

The statute declares such buildings, places, tents, or booths and the furniture, fixtures, and contents a nuisance. Subsection (2) of the statute declares places used on two or more occasions by a criminal gang, criminal gang members, or criminal gang associates for the purpose of engaging in criminal gang-related activity a nuisance.

Nuisances described in s. 823.05, F.S., must be abated and enjoined pursuant to ss. 60.05 and 60.06, F.S. Section 60.05, F.S., authorizes the Attorney General, state attorney, city attorney, county attorney,

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and "3 arrested at massage parlor" <http://www.newsherald.com/news/crime-public-safety/3-arrested-at-massage-parlor-1.31152> (last visited on January 22, 2013).

<sup>20</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

and any citizen to sue in the name of the state to enjoin the nuisance, the person(s) maintaining it, and the owner or agent of the building or ground on which the nuisance exists. The court, based on evidence<sup>21</sup> or affidavit, may issue a temporary injunction enjoining:

- The maintaining of a nuisance;
- The operating and maintaining of the place or premises where the nuisance is maintained;
- The owner or agent of the building or ground upon which the nuisance exists; and
- The conduct, operation, or maintenance of any business or activity operated or maintained in the building or on the premises in connection with the maintenance of the nuisance.<sup>22</sup>

The injunction must specify the activities enjoined and must not preclude the operation of any lawful business not conducive to the maintenance of the alleged nuisance.<sup>23</sup> If the existence of a nuisance is shown at the final hearing, the court must issue a permanent injunction.<sup>24</sup>

Section 60.06, F.S., requires the court, upon proper proof, to order the abatement of nuisances mentioned in s. 823.05, F.S., and authorizes the court to enforce injunctions by contempt.

#### Effect of the Bill

The bill amends s. 823.05, F.S., to declare massage establishments that operate in violation of s. 480.0475, F.S. (the newly created operating hours and domicile prohibitions), and s. 480.0535(2), F.S. (which requires massage establishment operators to provide identification upon request of a law enforcement officer), a nuisance that may be abated or enjoined as provided in ss. 60.05 and 60.06, F.S.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 480.047, F.S., relating to penalties.

Section 2. Creates s. 480.0475, F.S., relating to massage establishments; prohibited practices.

Section 3. Amends s. 823.05, F.S., relating to places and groups engaged in criminal gang-related activity declared a nuisance; may be abated and enjoined.

Section 4. Provides an effective date of October 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of this bill. However, because second or subsequent violations of the bill are third degree felonies, it may have a negative prison bed impact on the Department of Corrections.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

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<sup>21</sup> Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of a nuisance. Section 60.05(3), F.S.

<sup>22</sup> Section 60.05(2), F.S.

<sup>23</sup> Section 60.05(2), F.S. At least 3 days' notice in writing shall be given defendant of the time and place of application for the temporary injunction.

<sup>24</sup> Section 60.05(4), F.S.

2. Expenditures:

The bill creates two new first degree misdemeanor offenses relating to massage establishments. This may have a negative jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Massage establishments will no longer be permitted to operate between the hours of 10:00 p.m. and 6:00 a.m., nor will such establishments be able to be used as a principle domicile unless zoned as such by local ordinance.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Board will likely amend their rules to establish disciplinary guidelines applicable to the prohibitions created by the bill. However, because the Board currently has broad authority to adopt rules to implement the provisions of the Act, it does not appear that additional rulemaking authority is needed.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 16, 2013, the Criminal Justice Subcommittee adopted two amendments and reported the PCB favorably. The first amendment clarifies that massage establishments that meet *either* of the exceptions are exempt from the operating hours prohibition. The second amendment makes second or subsequent violations of s. 480.0475, F.S., a third degree felony.

This analysis is drafted to the PCB as amended and passed by the Criminal Justice Subcommittee.